In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-378

JAMES NATHANIEL GIBSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in holding that he does not have standing to make the claim that two wire interceptions were invalid under *United States* v. *Giordano*, 416 U.S. 505. The interceptions admittedly had no connection with and in no way implicated petitioner, but supplied probable cause for the interception of two telephones of another person to whom petitioner transmitted wagering information.

After a nonjury trial upon stipulated facts (Pet. App. A, pp. 3a-5a) in the United States District Court for the Eastern District of Virginia, petitioner was convicted of interstate transmission of wagering information, in violation of 18 U.S.C. 1084. Petitioner was sentenced to a term of two years' imprisonment and fined $5,000. The court of appeals affirmed (Pet. App. B; 500 F.2d 854).

The evidence supporting petitioner's conviction was obtained from a court-authorized wire interception of gambling conversations over two telephones used by one

John Commings and located in Bethesda, Maryland (hereinafter "Commings interception") (Pet. App. L, p. 8*l*). Although petitioner was not a target of this interception (Pet. App. L, p. 3*l*), his communications were intercepted when he transmitted wagering information from Alexandria, Virginia, to one of the Commings telephones in Bethesda, Maryland (Pet. App. A, pp. 4a-5a). Probable cause for this interception was obtained in part from court-authorized interception of two different telephones in Washington, D.C., used by one Louis Mantello (hereinafter "Mantello interceptions"). Although the Mantello interceptions were court authorized and supported by probable cause, the application had been authorized by the executive assistant to the Attorney General and hence the interceptions were not in compliance with Title III (Pet. App. B, p. 2b). *United States* v. *Giordano,* 416 U.S. 505. The Mantello interceptions, however, as petitioner concedes, had no connection with him, and he was in no way implicated by evidence derived from those interceptions (Pet. 14).

Petitioner challenges the Commings interception on the ground that probable cause therefor was obtained from the Mantello interceptions (Pet. App. B, p. 2b).[1] However, the court of appeals correctly held that petitioner had no standing to raise the *Giordano* defect

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[1]Petitioner concedes (Pet. 15) that the circumstances surrounding the authorization of the Commings application are identical to those which were at issue in *United States* v. *Chavez,* 416 U.S. 562, namely, that although the application had been authorized by the Attorney General, the application and order misidentified the authorizing officer as an Assistant Attorney General. Petitioner contends (Pet. 7-11), however, that *Chavez* should be overruled because the Court, by interpreting Title III to require suppression of evidence only in cases of serious statutory

in the Mantello interceptions. Although there is a causal connection between the Mantello and Commings interceptions, suppression of evidence "can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Alderman* v. *United States*, 394 U.S. 165, 171-172.[2] The *Giordano* defect affected only the Mantello intercep-

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violations, violated the doctrine of separation of powers. However, "[t]he interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function," *United States* v. *American Trucking Associations*, 310 U.S. 534, 544, and the Court in *Giordano* did no more than construe 18 U.S.C. 2518(10)(a)(i) in accordance with well settled rules of statutory construction. See *United States* v. *American Trucking Associations, supra*, 310 U.S. at 542-544; *Platt* v. *Union Pacific Railroad Co.*, 99 U.S. 48, 58. The cases cited by petitioner (Pet. 12) for the proposition that penal statutes should be strictly construed are inapposite. The Court in *Giordano* was not construing a penal statute, but rather one that regulates the government's use of an investigative tool.

[2]Although the Court there was discussing standing to raise Fourth Amendment violations, it is clear that Congress intended the same rules of standing to apply to motions to suppress evidence derived from Title III interceptions. S. Rep. No. 1097, 90th Cong., 2d Sess., p. 91; *Alderman* v. *United states, supra*, 394 U.S. at 175, n. 9.

tions, but petitioner was not a target of them, and his conversations were not intercepted during their course. Therefore, since the Mantello interceptions did not violate petitioner's rights, he has no standing to raise the illegality of that overhearing in connection with his motion to suppress evidence derived from the Commings interception. Cf. *Dearinger* v. *Rhay*, 421 F. 2d 1086, 1088 (C.A. 9).

While it is true that petitioner would not have been overheard but for the Mantello interceptions, this amounts simply to the contention that he would not have been overheard but for the violation of Mantello's rights, and it is axiomatic that one may not seek to suppress evidence on the ground that it was derived from the violation of someone else's rights. *United States* v. *Calandra,* 414 U.S. 338, 348; *Brown* v. *United States*, 411 U.S. 223, 229-230; 348; *Alderman* v. *United States, supra*, 394 U.S. at 171-172; *Wong Sun* v. *United States*, 371 U.S. 471, 492; *Goldstein* v. *United States*, 316 U.S. 114, 121, 122.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.